T-West Sales and Service, Inc. d/b/a Desert Toyota *and* International Association of Machinists and Aerospace Workers, Local Lodge 845, AFL–CIO. Cases 28–CA–19447 and 28–CA–19524

December 23, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On March 25, 2005, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

I. INTRODUCTION

The issues in this case concern the Respondent's conduct during collective-bargaining negotiations with the Union. The General Counsel issued a complaint alleging, among other things, that the Respondent violated Section 8(a)(5) and (1) by failing to bargain in good faith, failing to provide requested information, and failing to notify and bargain with the Union about disciplinary action taken with respect to two employees. The judge found that the Respondent violated Section 8(a)(5) and (1) in all respects. As explained below, and pursuant to our decision in *Desert Toyota,* 346 NLRB 118 (2005) (*Desert Toyota I*), we reverse the judge's findings of violations.[1]

II. DISCUSSION

This is the third in a series of related cases concerning this employer. *Desert Toyota I* concerned the Respondent's reactions in early 2002 to the Union's organization campaign directed at employees in the Respondent's Las Vegas, Nevada automobile sales and service facility. The judge in that case found that the Respondent committed various unfair labor practices, culminating in the termination of the Union's "contact employee" at the Respondent's facility. Based on those findings, the judge recommended issuance of a *Gissel*[2] bargaining order.

In part, the issues in *Desert Toyota II*[3] concerned the Respondent's alleged reactions to the judge's decision in *Desert Toyota I.* Significantly, the complaint alleged, among other things, that the Respondent refused to bargain with the Union as required by the judge's decision in *Desert Toyota I*, made unilateral changes in its employees' terms and conditions of employment, and refused to provide requested information to the Union. The judge in *Desert Toyota II* found that the Respondent violated Section 8(a)(5) and (1) in all respects.

Today, we issue our decision in *Desert Toyota I* and *Desert Toyota II.* In *Desert Toyota I*, the Board reversed the recommended *Gissel* bargaining order. Pursuant to that decision, the Board in *Desert Toyota II* found that the Respondent did not have an obligation to bargain with the Union and dismissed each of the 8(a)(5) and (1) allegations in that case. Consistent with the foregoing, we dismiss the 8(a)(5) and (1) allegations in this case as well.[4]

ORDER

The complaint is dismissed.

Joel C. Schochet, Esq., for the General Counsel.
Douglas R. Sullenberger, Esq. and *Mark J. Ricciardi, Esq.,* for the Respondent.
Don C. Whitaker, for the Charging Party Union.

DECISION[1]

ALBERT A. METZ, Administrative Law Judge. The issues presented are whether the Respondent has violated Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (the Act).[2] On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Nevada corporation, maintains a place of business in Las Vegas, Nevada, where it is engaged in the business of car sales and service. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The record evidence shows that the Union is a labor organization within the meaning of Section 2(5) of the Act, and I so find.

[1] There are no exceptions to the judge's dismissal of the remaining allegations that the Respondent violated Sec. 8(a)(3), (4), and (1) when it suspended employee Clayton Lamoya and suspended and discharged employee Thomas Pranske.

[2] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[3] *Desert Toyota,* 346 NLRB 132 (2005).

[4] In light of our disposition of this case, we do not pass on the judge's findings that the Respondent's conduct during the course of negotiations evidenced a failure to bargain in good faith or that its actions otherwise were inconsistent with the requirements of Sec. 8(a)(5).

Member Liebman dissented from the denial of a bargaining order in *Desert Toyota I*, but agrees that the Board majority's decision there is dispositive here.

[1] This matter was heard at Las Vegas, Nevada, on October 5–7, 2004. The briefs and decision in this case were unfortunately delayed for many weeks due to the court reporter's inability to transmit the record in a timely manner. All dates in this decision refer to 2004, unless otherwise stated.

[2] 29 U.S.C. § 158(a)(1), (3), (4), and (5).

II. BACKGROUND

This case involves an analysis of whether the Respondent has bargained in good faith and whether its discipline of two employees violates the Act. The Respondent's bargaining obligation arises from a recommended bargaining order issued by Administrative Law Judge Lana Parke in her decision of November 13, 2002 JD(SF)–92–02 (*Desert Toyota I*—presently before the Board on appeal), and the 10(j) injunctive relief granted by Judge Larry R. Hicks, United States District Court for the District of Nevada, on February 20, 2004. Judge Hicks' Order in part required the Respondent to take certain affirmative actions, including (1) on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement, and, (2) promptly provide the Union with all relevant and necessary information it has requested for the purposes of representing unit employees.

As detailed below, the Parties have been engaged in negotiations since Judge Hicks granted the injunctive relief. The bargaining unit description is:

> All full-time and regular part-time service technicians, including Toyota technicians, used car technicians, accessory installers, and lube technicians employed by Respondent at its Las Vegas, Nevada facility; excluding all other employees, office clerical and professional employees, guards and supervisors as defined in the Act.

The Respondent's suspension and ultimate discharge of Thomas Pranske along with the suspension of Clayton Lamoya compose the remaining issues. Their discipline is alleged to violate Section 8(a)(1), (3), (4), and (5) of the Act because of their union support, the fact that they gave testimony under the Act and because the Respondent refused to bargain in good faith concerning their discipline. Pranske testified on behalf of the Union in the hearing held before Judge Parke. Pranske and Lamoya were witnesses for the Union in a case involving the same Parties in a hearing before me in *Desert Toyota II* (JD(SF) –86–03). That decision is also pending on appeal before the Board.

III. FACTS

The Government alleges that, although the Respondent has met with the Union it has continued to refuse to bargain in good faith with the Union because it has engaged in dilatory tactics, failed to meet with the Union at reasonable times and failed to provide requested relevant and necessary information to the Union. The Respondent denies that it has refused to bargain in good faith.

A. Prelude to Bargaining

After Judge Hicks issued the 10(j) injunctive relief, Union International Business Representative Don Whitaker wrote the Respondent on March 2, requesting that the Company meet and bargain concerning an initial collective-bargaining agreement. Whitaker also again requested information that the Respondent previously had refused to provide. At least some of this information was the subject of litigation in *Desert Toyota II* and the Respondent was found to have violated the Act by not supplying the information. Whitaker's letter was forwarded to Jorge Gonzalez, director of human resources for the Respondent's parent company, AutoNation, at his office in Fort Lauderdale, Florida. On March 9, Gonzalez wrote to Whitaker notifying him that he would be the Respondent's principal spokesman and proposing three dates to commence negotiations (March 30; April 8; and April 13). He also stated that the Respondent was in the process of assembling information that the Union had requested.

On March 11, Whitaker responded and agreed to start the negotiations on April 8, in order to give the Respondent enough time to assemble the requested information. Whitaker informed Gonzalez that the Union was available for negotiations during the remainder of April and asked that Gonzalez contact him in order to schedule additional dates for bargaining in May, June, and July. Whitaker additionally requested that arrangements be made so that he could take a tour of the bargaining unit employees' work area during regular working hours. Whitaker attributed this request to his concern for the safety and health of the unit employees.

Whitaker and Gonzalez continued to exchange letters and talked on the telephone before the April 8 meeting. On March 11, Gonzalez wrote to Whitaker confirming that he would meet on April 8, and stating that he was also available to meet on April 9. Gonzalez said that additional negotiating dates could be agreed to at the April 8 meeting. Gonzalez informed Whitaker that the Respondent was assembling the requested information and that it would be sent to the Union before April 8. Gonzalez stated in response to Whitaker's request for a tour of the facility that there had been no reports of any health or safety issues involving the employees.

Whitaker wrote two letters to Gonzalez on March 19. The letters confirmed the dates of negotiations and expressed a concern that the Respondent was not providing the Union with information that it had requested, thus, placing the Union at a disadvantage in negotiations. Whitaker also reiterated his request for a tour of the Respondent's shop.

On March 24, Gonzalez wrote to Whitaker and stated that he hoped that Whitaker would receive the requested documents by the time that the Parties met on April 8. Gonzalez also questioned Whitaker's request for a tour of the facility, stating he was unclear as to the relevance of the Union's request.

By letter dated March 26, Gonzalez sent information to the Union in response to the Union's earlier request. Three days later Gonzalez sent the Union a copy of the Respondent's employee handbook. Gonzalez wrote to Whitaker on March 30, and informed him that the average medical cost per employee per year was $1877.01. On April 5, Whitaker notified Gonzalez that employees Richard Drugmand and Tom Pranske had been selected to attend negotiations on behalf of the Union. On April 6, Gonzalez wrote to Whitaker to confirm the Parties' negotiations would take place on April 8, at the offices of the Federal Mediation and Conciliation Services (FMCS) and suggested that the meeting commence at 10 a.m.

B. April 8—Negotiations

The Parties met as scheduled on the morning of April 8, at the FMCS office. Attending for the Union were Whitaker, Kevin Cummings, the Union's communications representative, Pranske, and Drugmand. The Respondent was represented by Mark Ricciardi, the Respondent's attorney, Gonzalez, Gaylen Bartlett, the Respondent's district director of human resources, Layla Holt, the Respondent's Las Vegas human resources manager, and Vinnie Casucci, the Respondent's service director. Whitaker went over the details of the District Court injunction and the Union presented the Respondent with its initial proposal. Whitaker went over each of the articles in the proposal and discussed with Gonzalez the information that Respondent had failed to provide and explained the type of benefit information that the Union required. Whitaker noted that the Respondent had failed to send the Union information regarding employees Marvin Mallory and Beshan Jackson. Gonzalez stated that he would have to review the Union's proposal and that Whitaker could take a tour of the dealership the following day. Whitaker protested that the negotiations should continue into the next day, but he finally relented and agreed to tour the facility on April 9. The Parties agreed to continue negotiations on May 4, 5, and 6. The negotiations ended at approximately 3:35 p.m. Following negotiations on April 8, Gonzalez faxed benefit information to Whitaker's office in California and e-mailed Whitaker with information regarding the two employees.

C. April 8—Car Inspection—An Overview

Pranske and Clayton Lamoya are conceded to be union supporters and there is no dispute that the Respondent had knowledge of their support. On April 8, Pranske attended the first negotiating session. After the negotiations ended for the day, Pranske returned to the Respondent's shop where he discussed the day's events with other car technicians.

Lamoya was in the shop where he had parked a 1989 Toyota Corolla that he had purchased and been repairing for his son's use. Before Lamoya bought the car it had been in a serious accident and was listed as "totaled." Lamoya's wife had previously gone to the Nevada Department of Motor Vehicles to register the car but was told that due to its "totaled" status the vehicle would have to be inspected and certified as safe by a State certified garage before it could be licensed. On April 8, Lamoya asked Pranske to do him a favor and certify the car for registration. After a cursory examination, Pranske did fill out a Nevada Department of Motor Vehicles certification form stating that the car passed inspection.

It is not disputed that the certification form that Pranske filled out and signed requires the mechanic/inspector to perform a series of visual and other inspections to ensure that the State's minimal safety requirements have been met. Pranske admittedly did not perform all of the required inspections and took Lamoya's word for some of the safety factors being okay.

When the certificate was again submitted to the State, there was a discrepancy in the paper work and the Respondent was contacted to resolve the problem. In checking into the matter, the Respondent discovered that the vehicle was not shown on its records as recently having been in its shop. The Nevada Department of Motor Vehicles began investigating the circumstances surrounding the vehicle's inspection. The Respondent likewise started an investigation into the matter and on April 20, decided to suspend Pranske and Lamoya. In May, the DMV issued a report finding Pranske guilty of falsely filing a document with the State. The Respondent subsequently terminated Pranske for his part in the inspection falsification and confirmed the suspension of Lamoya, but offered him reinstatement.

The Union subsequently alleged that the Respondent had treated technician, Steve Jackson, who did not support the Union, with much less harshness than Pranske and Lamoya for having engaged in similar conduct. As discussed in detail below, Jackson was found to have failed to properly conduct a smog inspection on Manager Scott Waddell's truck and the matter was investigated by the State DMV. Jackson received a warning from the State for his conduct of the vehicle test. The Respondent terminated Waddell for his part in the matter. Jackson subsequently blamed fellow employee Richard Drugmand for the investigation and had confrontations with him about the matter. The Respondent never suspended Jackson or fired him because of his faulty smog test or subsequent provocative conduct.

D. The Union's Tour of the Dealership—April 9

On April 9, Whitaker went to the Respondent's dealership and was given a 1-hour tour by Casucci, Holt, and the Respondent's safety person. Whitaker referred to the technicians' toolboxes during the tour and commented they were the reason that the Union was proposing that the Respondent provide employees with tool insurance. The Respondent's representatives told him that the Company already provided tool insurance. Later in the day, Whitaker e-mailed Gonzalez and told him that requested information was missing regarding a third employee, Matt Warren. Whitaker also asked for information regarding the Respondent's tool insurance for employees. Gonzalez replied on April 11, and told Whitaker that he would provide the requested information.

E. Subsequent Correspondence

On April 13, Gonzalez wrote two letters to Whitaker. In these letters Gonzalez commented that Whitaker had requested that the Respondent negotiate with the Union before making any changes in the shop, and before imposing any discipline. Gonzalez stated that the Respondent would be "guided by our own good-faith judgment when deciding when to notify you of changes to be made in the shop." Gonzalez advised Whitaker that the Respondent knew of no obligation to inform the Union before imposing discipline. Gonzalez stated that the Union's contract proposal included a provision for interest arbitration. He said that such a provision was not a mandatory subject of bargaining, and that any willingness by the Respondent to bargain over the provision would not constitute a waiver of the Respondent's rights.

Also on April 13, Gonzalez e-mailed Whitaker and explained why certain employees were left out of the information given to the Union. Nine days later, Gonzalez e-mailed Whitaker with information from Bartlett regarding the three employees. Gonzalez also explained the tool insurance provided by the Re-

spondent. On that same day, Whitaker e-mailed Gonzalez to confirm negotiation dates in May. He also asked for more details with regard to the tool insurance.

On April 26, Gonzalez wrote to Whitaker and told him that although they had planned to meet for 3 days on May 4, 5, and 6, Gonzalez had to be in San Francisco on May 6 and 7 to negotiate a contract with the Teamsters Union representing one of AutoNation's dealerships. Gonzalez also proposed June 8 and 9 as future negotiation dates. On April 30, Whitaker wrote back and stated that the Union did not agree to cancel negotiations on May 6. Whitaker expressed his belief that the Company was seeking to delay negotiations and that not meeting again until June 8 and 9 was evidence of bad faith. One of Respondent's attorneys, James Walters, replied the same day and defended the negotiation schedule stating the cancellation of dates in May was only the cancellation of the last half-day of a 2-1/2-day session.

On April 30, Whitaker wrote to Gonzalez about Gonzalez' cancellation of negotiating dates and the suspensions of Lamoya and Pranske. Whitaker accused the Respondent of unlawfully suspending Pranske and Lamoya, and compared that action to his suspension of the union supporter at another AutoNation dealership. Whitaker demanded that the Respondent cease its unlawful behavior; and ended his letter by noting that the Respondent had failed to send him information regarding two new employees.

By letter also dated April 30, Walters answered Whitaker's letter and stated that because the Union had filed an unfair labor practice charge with the Board about the suspensions of Pranske and Lamoya, the Respondent would not provide the Union at the May 4 meeting with "any documents, statements, policies or other information you have requested concerning Mr. Pranske and Mr. Lamoya."

F. May 4–5 Negotiations

On May 4, the Parties met for their second negotiation session. Gonzalez, Ricciardi, Bartlett, Holt, Casucci, and Jill Bilanchone, the Respondent's senior employment counsel, represented the Respondent. Whitaker, Pranske, and Drugmand attended for the Union. Negotiations commenced at approximately 9:30 a.m. and the Union submitted the remainder of its contract proposal completing its offer of April 8.

At approximately 10:30 a.m. the Parties took a break to review the proposals. At that time Gonzalez informed Whitaker that there were union pickets at the Respondent's facility. Gonzalez and the other representatives of the Respondent then left to go to the Respondent's facility to survey the picketing and meet with employees concerning the picketing.

The Parties returned at 2:10 p.m. at which time Whitaker spoke to Gonzalez privately until about 2:45 p.m. about the suspensions of Lamoya and Pranske. Following these discussions the representatives met for further bargaining. The Respondent submitted its initial proposal to the Union and the Parties also discussed Toyota certifications. Whitaker asked Casucci whether a technician needed any of the certifications to work on any Toyota other than the Prius, a gas-electric hybrid. Casucci did not know the answer to that question. The Parties also discussed whether employees should be required to have a high school diploma and the training that employees received. The subject of the Respondent's AutoNation health plan and the Union's health plan was also discussed. The Respondent mentioned to the Union its business ethics program, and stated that it should continue to apply to the technicians. Negotiations ended at 7:30 p.m. Whitaker wrote to Gonzalez that evening and expressed his frustration at not being able to meet more than two times per month when a large Company such as AutoNation should be able to provide a representative to bargain on a more frequent basis.

May 5 negotiations commenced at 10 a.m. and were attended by the same party representatives, with the addition of Union Grand Lodge Representative Charles Toby. The Union submitted an oral counterproposal on grievance and arbitration and there was a discussion about technician certifications and employee classifications. The Respondent distributed a matrix of Toyota certifications to the union representatives and much of the day was devoted to discussing this matter. The Parties took a 2-hour lunchbreak and bargaining ended at approximately 3:30 p.m. after it was preliminarily agreed to meet again on June 8 and 9.

Gonzalez and Whitaker had a telephone conversation the evening of May 5, and Whitaker requested that the Respondent reinstate Lamoya and Pranske. Gonzalez declined to discuss the suspensions in depth because the Union had filed charges about the matter with the Board's Regional Office. Gonzalez said that the investigation was in the hands of the DMV and that what that agency decided to do would determine what the Respondent would do about Lamoya and Pranske.

Whitaker wrote to Gonzalez on May 7, and demanded that the Respondent reinstate Pranske and Lamoya to their jobs. On May 19, Gonzalez wrote to Whitaker and proposed June 8 and 9 for the next round of negotiations. He also requested copies of the summary plan descriptions (SPDs) of the Union's health and welfare and pension plans. Whitaker confirmed the dates for bargaining by letter dated May 20, and complained that he did not believe that 2 days of bargaining per month were sufficient. He requested that Gonzalez provide additional dates for negotiations.

By letter dated May 17 to Gonzalez, Whitaker requested the suspension and termination notices given to Pranske and Lamoya, as well as the evidence supporting those actions. Gonzalez wrote in response on May 21, by stating, "We do not believe that it is appropriate for us to provide the same information to you that we are providing to the Labor Board." Whitaker also on May 17, asked for the written warning given to Jackson and the evidence concerning the smog test incident involving Waddell's truck.

On May 21, Gonzalez wrote to Whitaker about the many letters the Union had sent the Respondent concerning negotiations at its Las Vegas dealership and at Power Ford, another AutoNation dealership where the same Parties were bargaining for a collective-bargaining agreement. Gonzalez accused Whitaker of harassing the Respondent with the plethora of correspondence and "the same tired anti-employer rhetoric." The letter discussed several matters that had arisen at both dealerships including, personnel matters, training, and the Pranske and Lamoya discipline situations. Whitaker wrote back the same

day, and characterized Gonzalez' letter as "harsh and unfortunately misleading" in tone.

On May 22, Whitaker e-mailed Gonzalez to say that he had inquired about the Union's health and welfare and pension SPDs. Whitaker also reminded Gonzalez that the Respondent was going to provide the Union with information relating to the Respondent's proposed drug and alcohol program.

G. June 8–9 Negotiations

The Parties met on June 8, with Gonzalez, Ricciardi, Bartlett, Holt, Casucci, and Duane Burroughs, AutoNation's director of fixed operations for the southwest district, representing the Respondent. The Union was represented by Whitaker, Pranske, and Drugmand. The Respondent submitted its second proposal at this session. There was discussion about part of that proposal which added language to the management-rights clause. Other matters discussed included job classifications being based on certifications, a drug and alcohol policy, fair distribution of work, subcontracting, and shop rules.

On June 9, the Parties met and discussed skill sets, certification, training, drug and alcohol policy, grievance and arbitration, and subcontracting. A tentative agreement was reached on subcontracting.

H. Subsequent Events

On June 25, the Union filed a surface bargaining charge against the Respondent. On June 30, Whitaker wrote to Gonzalez inquiring as to the negotiation dates for July and complaining that the Respondent was restricting negotiations to once or twice a month. On July 2, Gonzalez proposed July 20 and 21 for bargaining. On July 11, Gonzalez e-mailed the Respondent's newest proposal to Whitaker.

I. July 20–21 Negotiations

The Parties met on July 20. Gonzalez, Bartlett, Holt, and Maureen Redman, AutoNation's director of benefits and workers' compensation, represented the Respondent. Whitaker and Drugmand were present for the Union. Instead of providing the health benefit information that the Union had requested in March, Gonzalez introduced Redman and said that she was going to give a presentation on health benefits and the Respondent's 401(k) plan. Redman's talk consumed several hours and little time was devoted to bargaining. Whitaker asked the Respondent to make a proposal concerning benefits, but Gonzalez said that they wanted to get through the contract language first. At the end of the session, the Union submitted a counterproposal to the Respondent's last proposal. This counterproposal included language on purpose, jurisdiction, recognition, and discrimination.

The same individuals attended negotiations on July 21, except that Casucci replaced Redman. The Respondent submitted another proposal at this time. In the management-rights section the Respondent added language supporting its right to the "full and absolute operation, control and management of its business." The Respondent also added, to its previously enumerated rights, "the right to organize, re-organize, discontinue, enlarge, reduce, or revise a function or department." The Respondent also submitted a handwritten proposal on productivity and efficiency, which the Union agreed to review. The negotiations ended at around 5 p.m. and the Parties agreed to meet again on August 18, 19, and 20.

After negotiations concluded on July 21, Whitaker and Drugmand met with Gonzalez and Bartlett to discuss what had occurred between Jackson and Drugmand. Gonzalez told the union representatives that the Respondent had given Jackson a warning for the smog incident and a final warning for the incident with Drugmand. Whitaker requested the warning notices and the documentation regarding the final warning; and Gonzalez agreed to provide them. (Tr. 334.)

On July 30, Gonzalez e-mailed to Whitaker the results of the investigation conducted by Bartlett purportedly of the incident discussed by Drugmand. In fact, Bartlett's report concerned yet another incident where Jackson threatened Drugmand. On that same day, Gonzalez faxed Whitaker and said that he was attaching "the two written warnings given to Stephen Jackson." However, only one warning to Jackson was attached, along with a personnel status change form reflecting that warning, and what appeared to be a copy of Gonzalez' travel arrangements. The Union never received the evidence relating to Jackson's warning.

J. August 18–19 Negotiations

On August 18, the Parties again met for bargaining. Gonzalez introduced two individuals who were present to talk about the Respondent's 401(k) plan. Whitaker questioned the need to listen to their presentation as the Union had already proposed keeping the Respondent's 401(k) plan. The Respondent had not made any counterproposal to this offer. Nonetheless, the presentation was made and each side asked questions on the matter. After lunch the discussion turned to other matters including stewards and hours of work. An agreement was reached on the subject of safety. The session ended at 6:25 p.m.

The August 19 bargaining session commenced later than scheduled because Gonzalez got lost getting to the FMCS' offices. Gonzalez also said that he had computer trouble and was having problems printing a proposal from his computer. That matter was finally resolved and the proposal was given to the Union. The Parties were able to agree on several tentative agreements that day, including one that was adopted from the Power Ford negotiations between Whitaker and Gonzalez. When Whitaker asked Gonzalez what time the Parties were meeting the following day, Gonzalez said that he had neglected to tell Whitaker that he had a doctor's appointment to discuss the results from a skin biopsy and would not be able to meet for negotiations that day. No negotiations did take place the following day.

K. September 14–15 Negotiations

The Parties met again on September 14. The Respondent presented a counterproposal to the Union and this was reviewed during the negotiations. Subjects discussed included the correct legal designation of the Company due to the addition of a new Toyota line of cars being added to the dealership, hours, days of work, shifts, work rules, Toyota car care clinics, flat rate time guides, warranty work, customer pay work, paid time- off policy, "come-backs" of vehicles, and overtime. After lunch the Union gave the Respondent a counterproposal regarding griev-

ance and arbitration which was identical to language that the Respondent had previously agreed to in negotiations with the Union at Power Ford in Torrance, California. The Parties reached a tentative agreement on that subject. A tentative agreement was also reached on the Union's proposal that it could refer candidates for job openings. Also discussed were employer incentive plans and anniversary bonuses.

At the September 15 negotiations, the Respondent presented the Union with a counterproposal on the successor article under discussion. The Parties reached a tentative agreement on that article. Other subjects discussed included further negotiations on anniversary bonuses, training, laundry and uniforms, paid time off, and funeral leave. The Respondent gave the Union information it had requested concerning the 401(k) plan and the Parties agreed to meet again on October 12, 13, and 14.

IV. ANALYSIS

A. The Respondent's Bargaining Conduct

The Government alleges that the Respondent failed to bargain with the Union in good faith by engaging in dilatory tactics, including stingy scheduling of meetings and the cancellation of meetings, in order to avoid reaching an agreement.

The Government's brief cites various acts by the Respondent as evidence of its dilatory bargaining tactics. First, the cancellation of the April 9 meeting so that Whitaker could be given his requested tour of the dealership and to give the Respondent time to review the Union's contract proposal received the previous day. Second, Respondent's taking a 4-hour break in negotiations on May 4, in order to go to the dealership because the Union surprised the Company by the commencement of picketing that morning at the facility. Third, the cancellation of the May 6 negotiations in order that Gonzalez could have time to begin bargaining with the Teamsters Union in the San Francisco area also over an initial contract. Fourth, Gonzalez was late to negotiations because he got lost. Fifth, Gonzalez did not inform the Union until asked, that he would be unavailable to negotiate August 2, because he had a doctor's appointment. In sum, the Government argues the Respondent sought to delay and impede the negotiations in order to avoid reaching an agreement and met with the Union no more than 2 days a month. The Respondent denies that its actions either were intended or had the result to avoid bargaining in good faith with the Union.

Section 8(d) of the Act defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." "Good-faith bargaining 'presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract.'" *Public Service Co. of Oklahoma*, 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003) (quoting *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 485 (1960)).

It is axiomatic that an employer's chosen negotiator is its agent for the purposes of collective bargaining, and that if the negotiator causes delays in the negotiating process, the employer must bear the consequences. See, e.g., *O & F Machine Products Co.*, 239 NLRB 1013, 1018–1019 (1978); *Barclay Caterers*, 308 NLRB 1025, 1035–1037 (1992). A party is generally not restricted in its right to select whom it pleases as its bargaining representative; provided, however, "that this designation does not collide with the duty under Section 8(d) 'to meet at reasonable times.'" *Caribe Staple Co.*, 313 NLRB 877, 893 (1994). Likewise, "Considerations of personal convenience, including geographical or professional conflicts, do not take precedence over the statutory demand that the bargaining process take place with expedition and regularity. An employer acts at its peril when it selects an agent incapacitated by these or any other conflicts." *Caribe Staple*, supra.

In the 6 months from April through September, the Parties met for negotiations on 11 occasions. Two additional days scheduled for negotiations were canceled by Gonzalez because of negotiations at another dealership and a meeting with his doctor. The Respondent also insisted that Whitaker take his requested tour of the dealership on the April 9 scheduled negotiation date and negotiations did not take place on that occasion. It is undisputed that many times the Union sought additional dates for negotiations but these efforts were rebuffed by the Respondent. The record also shows that the negotiations did produce exchanges of proposals and some agreements on several clauses of a collective-bargaining agreement. In addition, the Respondent did give the Union information it requested for negotiations and corresponded and talked to the Union about negotiation matters outside of formal meetings. Thus, some progress has been made in bargaining sessions. On balance, however, looking at the totality of the negotiations, I find that the Respondent has used the "busy negotiator" defense as a crutch in not pursuing negotiations to the extent contemplated by the Act's admonition to bargain in good faith. The Board emphasizes that an employer must devote the same attention to negotiations as it does to other business affairs. The Respondent's parent organization for whom Gonzalez works is a large national entity that has limited the availability of Gonzalez because he is allegedly their only experienced first chair negotiator. The inability of Gonzalez to meet, as repeatedly requested by the Union, with greater frequency than twice a month has been a major delaying factor in negotiations. It is apparent that more frequent meetings would advance negotiations consistent with the obligations imposed by the Act for good-faith bargaining and would harmonize with Judge Hicks' injunctive order commanding good-faith bargaining. *Rhodes St. Clair Buick*, 242 NLRB 1320, 1323 (1979). Here, "Considerations of personal convenience, including geographical or professional conflicts" have been used to delay negotiations. The Respondent refused to meet with relative frequency in order to negotiate to the point that I conclude the Respondent has violated Section 8(a)(1) and (5) of the Act by not bargaining in good faith with the Union.

I further note that the Respondent's bargaining obligation hinges upon the recommended bargaining order issued by Judge Parke. The Respondent has appealed that decision to the Board. Despite the pendency of that appeal, the Board did support Judge Parke's bargaining order decision to the extent that it authorized the seeking of 10(j) injunctive relief. In somewhat

analogous circumstances the Board has found that the Respondent cannot bargain in good faith by conducting negotiations while at the same time challenging a Board's certification of the unit involved in the negotiations. As the Board stated in *GKN Sinter Metals, Inc.,* 343 NLRB 315 (2004):

> The Board and the courts have held that where an employer continues to challenge the validity of a union's certification, it is effectively refusing to bargain with the union, even where the employer has stated that it is willing to engage in negotiations. See *Fred's Inc*., 343 NLRB 138 (2004), and cases cited therein (Board found refusal-to-bargain violation even where respondent had recognized and was bargaining with the union, because the respondent had filed an answer to the complaint denying the validity of the union's certification, had clearly communicated its intention to test the union's certification, and had not disavowed this intention despite its willingness to engage in negotiations). Thus, an employer "may negotiate with, or challenge the certification of, the Union; it may not do both at once." *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 225 (D.C. Cir. 1996).

In the instant case, the Respondent's answer denied the appropriateness of the unit, the majority status of the Union, the fact that the Union is the collective-bargaining representative of the unit, and that since November 12, 2002, the Union has, based on Section 9(a) of the Act, been the exclusive collective-bargaining representative of the unit. Here, as discussed above, the Respondent has not bargained in good faith with the Union and at the same time has been challenging its underlying legal obligation to bargain with the Union.

B. Additional 8(a)(5) Allegations

1. Information request concerning Pranske and Lamoya

The complaint alleges that the Respondent failed to give the Union information concerning Pranske and Lamoya that is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

On April 30, Whitaker wrote to Gonzalez and challenged the suspensions of Pranske and Lamoya. Whitaker stated, in part:

> Therefore, I am demanding that you cease and desist your bad faith conduct and immediately meet and negotiate and /or resolve these serious issues. In addition, I am demanding that you provide me with any and all documents, statements, policies, and/or other information that lead the Company to suspend Tom Pranske, [and] Clayton Lamoya. . . . (GC Exh. 23, p. 2.)

Attorney James Walters replied by letter also dated April 30 stating, in part:

> 4. In addition, regarding the investigatory suspensions of Mr. Pranske and Mr. Lamoya, you may not be aware that the situation involving these two individuals has been included in an Unfair Labor Practice Charge filed by the IAM Grand Lodge Representative Charles Toby. The Company hopes it will not have to try to resolve Unfair Labor Practice Charges at the bargaining table; the bargaining should center on the good faith discussions of non-economic and subsequent economic items, as agreed to at the first bargaining session between you and Mr. Gonzalez.
>
> 5. Consequently, we are not currently planning on bringing any documents, statements, policies or other information you have requested concerning Mr. Pranske and Mr. Lamoya to the meeting on May 4. The Company is cooperating with the National Labor Relations Board to provide evidence concerning the Unfair Labor Practice Charge involving these two individuals. (GC Exh. 24, p. 2)

Whitaker wrote to Gonzalez on May 17, and requested the suspension and termination notices given to Pranske and Lamoya, the evidence supporting those actions and to "immediately meet with me to negotiate and/or resolve these issues." On May 21, Gonzalez responded in a letter that "[w]e do not believe that it is appropriate for us to provide the same information to you that we are providing to the Labor Board. There is no grievance procedure in place at this time . . . ." (GC Exh. 33, p. 6.) The Respondent failed to provide the requested information or bargain about the matter.

It is well established that a labor organization which has an obligation under the Act to represent employees in a bargaining unit with respect to wages, hours, and working conditions, is entitled on request to such information as may be relevant to the proper performance of that duty. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967). Where the requested information concerns conditions of employment relating to employees in the bargaining unit represented by the union, the information is presumptively relevant to the union's representative function. *George Koch & Sons, Inc*., 295 NLRB 695 (1989); *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863 (9th Cir. 1977). The Board uses a liberal, discovery-type standard to determine whether the information is relevant, or potentially relevant, to require its production. *NLRB v. Acme Industrial Co*., supra; *W-L Molding Co*., 272 NLRB 1239 (1984). The Board stated in *Ohio Power*, 216 NLRB 987 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976):

> Where the information sought covers the terms and conditions of employment within the bargaining unit, thus involving the core of the employer-employee relationship, the standard of relevance is very broad, and no specific showing is normally required.

A labor organization is entitled to inquire into discipline imposed upon employees it represents and such a topic is a mandatory subject of bargaining. I find that the Union's request for information regarding the disciplining of Pranske and Lamoya was relevant and necessary for the carrying out of its representational duties. The Respondent cites no case authority for the proposition that it was privileged to refuse to supply the noted information based on the fact that an unfair labor practice charge was filed concerning the matter. I conclude that by failing to supply the Union with the information it sought about the discipline given to Pranske and Lamoya, the Respondent violated Section 8(a)(1) and (5) of the Act.

2. The refusal to notify the Union prior to disciplining of unit employees

The complaint alleges that the Respondent unlawfully refused to bargain because it refused to notify the Union prior to imposing discipline on unit employees and by imposing the discipline given Pranske and Lamoya without affording the Union an opportunity to bargain with the Respondent as to the discipline and the effects of the discipline. The Respondent denies that it had a legal obligation to notify or bargain with the Union prior to imposing discipline on Pranske and Lamoya.

At the April 8 negotiation session, Whitaker requested that Respondent negotiate with the Union prior to the imposition of discipline of any unit employee. Gonzalez responded by letter dated April 13, stating: ". . . we know of no legal obligation on the company to notify you prior to imposing discipline on an employee. . . . Therefore, the company respectfully denies your request." As noted in the section above, Whitaker had demanded information and bargaining concerning the discipline given to Pranske and Lamoya but the Respondent refused to do either.

The Respondent acknowledges that it has no specific policies or procedures concerning the handling or investigations conducted by the Nevada DMV. Holt also testified that the Respondent had never suspended or discharged anyone for falsifying a state document. The Respondent argues, however, that its ethics policy is a basis for its actions involving Pranske and Lamoya without the need for notifying or bargaining with the Union.

The Respondent has for many years maintained a code of business ethics and conduct that includes a section pertaining to "Accurate Books and Records." The code states that, "False or misleading entries must never be made or concealed in any Company record." (R. Exh. 33.) Section 2 of the "Requirements and Illustrations" provision, entitled, "Internal and External Reporting and Penalties," goes on to state:

> Information that associates record and submit to another party, inside or outside AutoNation, including government or regulatory authorities, must be accurate, verifiable, and complete. False or artificial entries must never be made in any AutoNation Record, including those submitted to government or regulatory authorities, for any reason, nor should permanent entries in the Company's Records be altered in any way. Associates must not use any report or Record to mislead or to conceal anything that is improper.
>
> Dishonest reporting, both inside and outside the Company, is not only strictly prohibited, it could lead to civil or even criminal liability for associates and AutoNation. This includes reporting information or organizing it in a way that is intended to mislead or misinform those who receive it. [R. Exh. 33.]

The ethics policy does not set forth any potential discipline for a violation of the policy. As noted, there is no practice as to how the Respondent handles a DMV situation such as is in dispute here. The Respondent concedes that its managers analyzed the situation surrounding the actions of Pranske and Lamoya and made a determination of what discipline was appropriate to fit that situation. Thus, the Respondent has not shown that it maintains detailed and thorough written discipline policies and procedures that deal with a similar situation.

I find that the Respondent has failed to establish that it had a past practice or engaged in any conduct that demonstrated how it would discipline employees for falsifying DMV documents. Thus, the Respondent's imposition of the discipline was entirely in its considerable and undefined discretion. Such discretionary acts are "precisely the type of action over which an employer must bargain with a newly-certified Union." See *NLRB v. Katz*, 369 U.S. 736, 746 (1962) (employer must bargain with union over merit increases which were "in no sense automatic, but were informed by a large measure of discretion"); *Adair Standish Corp.*, 292 NLRB 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990) (the Board held that in the face of a newly-certified union, the employer could no longer use its discretion in determining layoffs); *Garment Workers Local 512 (Felbro, Inc.) v. NLRB*, 795 F.2d 705, 711 (9th Cir. 1986) (employer must bargain with the union over economic layoff, which is "inherently discretionary, involving subjective judgments of timing, future business, productivity and reallocation of work"); *Eugene Iovine, Inc.*, 328 NLRB 294, 294 (1999). I find that because of the substantial degree of discretion that the Respondent used in imposing the disciplinary suspensions and discharge concerning Pranske and Lamoya that such matters are mandatory subjects of bargaining. See, e.g., *Ford Motor Corp. v. NLRB*, 441 U.S. 488 (1979); *Bath Iron Works*, 302 NLRB 898, 902 (1991). I conclude that the Respondent violated Section 8(a)(1) and (5) of the Act by imposing such discipline without giving the Union notice and an opportunity to bargain about these subjects. See, *Washoe Medical Center*, 337 NLRB 202 (2001), reconsideration denied, 337 NLRB 944 (2002).

C. Suspension of Lamoya—Suspension and Discharge of Pranske

1. The discipline

The complaint alleges that the Respondent unlawfully suspended employee Clayton Lamoya and unlawfully suspended and discharged employee Tom Pranske in violation of Section 8(a)(1), (3), and (4) of the Act. The Government alleges that these actions were based upon these employees' union activities and because they had given testimony under the Act. The Respondent denies that its discipline of these employees was the result of any of their activities protected by the Act and asserts their punishment was caused by their misconduct in falsifying the State of Nevada DMV inspection certificate.

Pranske and Lamoya are supporters of the Union's efforts to represent the Respondent's unit employees. Both men testified in previous unfair labor practice hearings regarding this Respondent. In *Desert Toyota II* it was found that the Respondent had violated Section 8(a)(1), (3), and (4) of the Act by giving Pranske unwarranted warnings. Pranske was a shop steward and participated in negotiations on behalf of the Union. The Respondent does not dispute that it had knowledge that Pranske and Lamoya are union supporters.

The events leading up to the Respondent's actions against these employees started when Lamoya purchased a damaged car for his son's benefit. He completed repairs on the car in

April 2004 and Lamoya's wife attempted to license the car with the State of Nevada. She was told by the State DMV that she needed a salvage certificate because the car had been listed as totaled.

On April 8, Lamoya brought his 1989 Toyota Corolla to the Respondent's dealership. April 8, was also the date of the first bargaining session between the Parties and Pranske was present for the meeting as an employee representative on the Union's negotiating committee. He had taken the day off from work but went to the Respondent's dealership at the end of the day to discuss the negotiations with the other employees. While Pranske was at the shop Lamoya asked him to sign a copy of Nevada form RD-64 (Certificate of Inspection/Affidavit of Construction), a form, certifying that the Corolla was safe for travel on Nevada roads. Pranske gave the car a partial inspection and signed the DMV form. He testified that he "looked at the car to see if the wipers, the horn and the turn signals worked. I asked Fuzz [Lamoya] does everything else work, he said, yes, and I filled out the form." Lamoya's wife subsequently submitted that form to the DMV in order to register the car.

On April 14, the Nevada DMV noticed a discrepancy in the form's business license number and also that the position of the person completing the form was not properly filled out. The DMV made an inquiry to the Respondent about the matter and was directed to Barry Neel, the Respondent's controller. He was told that the inspection form had the wrong garage number, and Neel was instructed that technicians should sign such forms as "mechanic" rather than "used car technician." Neel called Vinnie Casucci the Respondent's service director, to find out why a form would be completed by hand and sent to the DMV. Casucci had no knowledge of the document and a faxed copy of the form was requested from the DMV. Casucci soon learned that no repair order had been completed for the car since December 2000. Neel called the DMV on April 15, and told them that the Respondent had an issue with the form. The DMV advised that they would then hold in abeyance issuing a new title on the car.

On April 20, Pranske was called into an office and met with Service Manager Dave Pedersen, Human Resource Manager Layla Holt, and Larry Carter, market manager of the Desert Auto Group. Casucci asked Pranske about the car and learned it belonged to Lamoya. Holt told Pranske the inspection form was being questioned by the DMV and the Respondent had no record consistent with the car having recently been in the shop. Holt credibly testified that Pranske first told her that he did not look at the car because it was Lamoya's vehicle. When Holt expressed incredulity about that statement, Pranske told her that it was no "big deal" and then changed his story and stated that in fact he had looked at the car while it was on Lamoya's rack in the shop. Holt said that Pranske could not have inspected the car on April 8, because he was not shown to have been at work that day, and in fact attended the negotiation session. Pranske said he had come to the shop that day after the negotiations ended. Holt then informed Pranske that he was being suspended pending further investigation into the matter. When Pranske protested that he did not see the matter as a big deal because the car belonged to Lamoya, Holt said that it was a big deal because the Respondent could be liable under the circumstances.

Lamoya was then called to the office and questioned about the DMV form, the fact that there was no relevant repair order on file for his car and the possible liability issues if the Respondent were sued over an accident involving that car. Lamoya explained that the car was for his son. Lamoya said that he had Pranske sign off on the safety repair work that had been done on the car and that Pranske had examined the car in the parking lot. When asked why there was no repair order for the car in the Respondent's records, Lamoya told Holt that there had been no safety work or inspection done on the car in the shop as it had all been done at his residence. Holt told Lamoya that he was suspended for 3 days pending investigation.

Pranske was in Holt's office a couple of days later in order to pick up his suspension notice. Holt told him that DMV investigator, Chester Clagett, was looking into the situation. Pranske then decided to go to the DMV where he met with Clagett, and gave him a statement. In this document, dated April 22, Pranske made the following untrue statements: (1) that he checked all items on the inspection list to see that they were working; (2) the car passed all safety checks; (3) that he had conducted an emission test on the car; and (4) denied that he had conducted an illegal test on the vehicle. (GC Exh. 73.) Clagett then went to the Respondent's dealership and met with Holt. Clagett asked her about the dates that Pranske had been working. Holt told him that Pranske had been off on April 8.

Clagett called Lamoya the following day and asked him to bring his Corolla to the DMV for an inspection. Lamoya complied and the car passed inspection. Clagett also asked Lamoya to give him a statement and Lamoya agreed. In that statement, Lamoya falsely said that Pranske did not inspect the car in the shop because Lamoya was concerned that the Respondent might discipline Pranske for doing unauthorized "side work" (work that is not recorded and compensated to the Respondent).

On April 26, Clagett prepared a report of investigation summarizing his findings and 3 days later signed an affidavit requesting a summons for Pranske under the Nevada Revised Statutes charging him with a misdemeanor of falsification of a document. On April 29, Clagett executed an affidavit in support of his request for summons for Pranske. In that affidavit Clagett notes that on April 26, Neel informed him that Pranske "was not present or working at Desert Toyota on April 8, 2004." In support of this statement, Neel supplied Clagett with Pranske's request for time off, the flag sheet report for that day showing that Pranske had not worked, and timecard records showing that Pranske had not worked that day. The district attorney's office ultimately declined to issue the summons and Pranske was not charged.

On May 4, Whitaker wrote to Attorney James Walters in response to an April 30 letter from Walters. Whitaker noted that the refusal of the Respondent to provide the Union with any information relating to the suspensions of Pranske and Lamoya were "disturbing," as was the disparity between the Respondent's treatment of Pranske and Lamoya on the one hand and the Respondent's treatment of technician Steven Jackson on the other. Whitaker again requested the Respondent's policies and procedures relating to investigations by the DMV. Walters responded by letter dated May 10, stating that the Respondent

maintained no policies and procedures to cover circumstances similar to what had occurred with Pranske and Lamoya. On May 11, the Respondent discharged Pranske.

Gonzalez had previously told Whitaker that the Respondent wanted to await the results of the DMV investigation before deciding what to do about Pranske and Lamoya. After learning the results of that investigation the Respondent determined to terminate Pranske. His personnel file shows he was discharged from employment due to a "violation of policy." Gonzalez explained the reasons composing that conclusion as follows:

> [A]fter the results of our own internal investigation and the results of the DMV investigation, it was all of our joint opinions that Mr. Pranske had falsified a State of Nevada document to an inspection that never took place, was done through the dealership license with the State of Nevada, placed the dealership's license to do that type of work at risk, and violated our company rules regarding accuracy and truthfulness and business and company records. [Tr. 658.]

Based on the State's conclusion that no summons should be sought against Lamoya, the Respondent decided to reinstate him to employment conditioned upon his returning to work within 5 days. Lamoya, however, had become employed by another dealership in the interim and declined the offer of reinstatement. Lamoya testified that the Respondent had given him a favorable reference when he sought employment with his new employer.

2. Alleged disparate treatment

The Government asserts that Pranske and Lamoya were treated disparately because of their union activities and for giving testimony under the Act. In support of that position, the Government presented evidence that in March 2004 Lamoya asked Pranske to do a smog inspection on a Chevrolet pickup truck that was owned by the then parts manager, Scott Waddell. Pranske told Lamoya that the truck would not pass inspection because its emission equipment had been removed. A couple of days later Pranske noticed that a Toyota Corolla he was working on had been removed from his work stall and taken to the smog inspection station by technician Steve Jackson. Pranske asked Jackson what he was doing with the Corolla. Jackson told him that he needed it to do a smog inspection for Waddell's truck. Pranske testified that the Toyota car he had been working on was being tested and he saw that the screen on the smog testing terminal displayed that the inspection was being performed on a Chevrolet truck. Pranske did not mention the incident to anyone at the time.

On April 22, Holt telephoned Pranske to explain that his suspension would last at least through the beginning of the following week. Pranske asked Holt if he gave her the names of employees who were faking smog tests would they receive the same treatment. Holt said that if he wanted to give her names she would investigate. Pranske did not offer her any names.

Approximately a month later, Pranske learned from State Investigator Clagett that the DMV report on Pranske had been submitted for consideration. Pranske then telephoned Inspector Kyle Moss of the DMV and reported the incident involving Jackson. He did so in order that he could show that the Respondent was treating Jackson more favorably than himself and Lamoya.

After receiving Pranske's call, Moss visited the Respondent's dealership and informed General Nanager Mark (Doc) Lane, Human Resource Manager Layla Holt, and Waddell about the substance of the complaint. Moss also spoke with Jackson who admitted that he did not examine Waddell's truck closely enough to determine if all of the emission equipment was installed on it when it was tested. Jackson did, however, deny that he had substituted another vehicle for Waddell's truck in the smog test. Moss issued Jackson a warning and directed him to perform another smog inspection on the truck. He did not issue any warning to Waddell even though Waddell admitted that he knew the emission equipment was not installed on the truck when he gave it to Jackson for testing.

Jackson did perform another inspection on Waddell's truck and it failed on the visual inspection. A few days later, Waddell resigned his employment after being asked to do so by the Respondent for having initiated an illegal smog inspection on his truck.

Jackson was peeved about the fact that he had been investigated by the DMV. As a result, he began making threats to fellow employee Richard Drugmand who was a known union supporter in the shop. On June 2, Jackson drove by Drugmand's bay and said something that Drugmand could not clearly understand. Later that morning, Jackson approached Drugmand and gestured at him to "come on" and fight. Drugmand ignored Jackson's provocations.

Shortly after the first incident, Jackson returned to Drugmand's bay and cursed at him. He asked if Drugmand had a problem with him and wanted to do something to him. Drugmand told Jackson he had no problem with him but it appeared that Jackson had a problem with him. Jackson again cursed at Drugmand and accused him of trying to have him fired because of the bogus DMV inspection. Jackson said that he wanted to go outside and kick Drugmand's ass. Drugmand told Jackson that he had nothing to do with trying to get Jackson fired. Drugmand told Jackson to go back to his work bay and gestured with his hand. Jackson slapped Drugmand's hand and attempted to provoke Drugmand to fight. Jackson said that he wanted to go outside or that he could give Drugmand his address so that they could fight later. Service Manager Dave Pedersen finally broke up the confrontation and took Jackson back to his work bay.

When Pedersen returned to Drugmand's bay a few minutes later, Drugmand adamantly told him that Jackson's threats had to stop. Drugmand told Pedersen that the threats had previously been verbal, but that this time Jackson had hit him. Drugmand protested that Jackson's abuse had been going on for too long and someone was going to get hurt. Pedersen said that he would talk with Service Manager Vinnie Casucci and that something would be done.

Drugmand met with Casucci and Pedersen later in the day. Casucci said that the employees needed to get along and that the Respondent had lost too many good employees. He specifically lamented the fact that Pranske and Lamoya were no longer employed with the Respondent. Casucci said that he would speak to Jackson about the problem.

On June 9, after negotiations had ended for the day, Drugmand and Whitaker discussed Jackson's angry behavior with Gonzalez and Galen Bartlett, AutoNation's human resource director for the southwest district. Gonzalez was also given a written statement that Drugmand had prepared about the matter.

On about July 6, Jackson walked through Drugmand's stall while punching his fist in his hand. Drugmand spoke to Casucci about Jackson's action the following day. Drugmand testified that Casucci assured him that he would speak to Drugmand and straighten the matter out. Casucci never again spoke to Drugmand about the second incident.

At negotiations on July 21, Drugmand and Whitaker spoke to Gonzalez about the second Jackson incident. Gonzalez said that Jackson had received a written notice with regard to the June 2 incident and Whitaker asked Gonzalez for a copy of the written warning.

3. Analysis of the discipline given Pranske and Lamoya

The General Counsel has the initial burden of establishing that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(1) and (3). *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The elements commonly required to support such a showing of discriminatory motivation are employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. The Board also applies this *Wright Line* analysis to 8(a)(4) claims. *Taylor & Gaskin, Inc.*, 277 NLRB 563 fn. 2 (1985).

As previously noted, the evidence shows that both Pranske and Lamoya were supporters of the Union in its efforts to represent the unit employees. The timing of their discipline is consistent with their continuing support for the Union, including Pranske's membership as part of the Union's negotiating committee. As to the Respondent's animus with regard to the Union, I note the findings in *Desert Toyota I* and *II* as well as the finding in this case that the Respondent has violated Section 8(a)(1) and (5) regarding its bargaining obligations. I further note the finding in *Desert Toyota II* that the Respondent violated Section 8(a)(1), (3), and (4) of the Act by issuing unlawful warnings to Pranske. I find, therefore, that the Government has laid the foundation for its required initial showing regarding the discrimination allegations it has made against the Respondent.

The Respondent meets this showing by establishing the complicity of Pranske and Lamoya in falsifying the inspection on Lamoya's vehicle. The falsification was followed by their attempts to disguise their actions and mislead the State's investigator as to what had taken place. The Respondent warned the men at the initial stages of its investigation that the matter was serious and put the dealership at risk of liability and problems with the State licensing authority. This conclusion was founded upon the Respondent's code of ethics which specifically condemns such conduct.

In response to the Government's contention that Jackson was treated more leniently than Pranske, the Respondent relies mainly on the fact that Jackson's conduct was less egregious because it involved a smog test, not a safety test. He readily admitted his error and was given warnings by the State and the Respondent. Waddell, the instigator of the inspection conducted by Jackson, was forced to resign. On balance, I find that the Respondent has shown that the treatment accorded to Jackson and Waddell was not of such a nature as to be considered disparate under all of the circumstances. I find, therefore, that the Respondent has met its burden of showing that the discipline given Pranske and Lamoya would have been administered regardless of their union activities and their testimony under the Act and, that such actions were not a pretext to punish them for such activities. I conclude that the Respondent has not violated Section 8(a)(1), (3), and (4) of the Act as alleged.

CONCLUSIONS OF LAW

1. The Respondent, T-West Sales & Service, Inc. d/b/a Desert Toyota, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Association of Machinists and Aerospace Workers, Local Lodge 845, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) and (5) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated the Act except as herein specified.

[Recommended Order omitted from publication.]